IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 830 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? No

2. To be referred to the Reporter or not? No @@
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3. Whether Their Lordships wish to see the fair copy of the judgement? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil Judge? No

ASRAF @ ASUDO MUSA KHAFI SUMRA

Versus

STATE OF GUJARAT

Appearance:

MS SUBHADRA G PATEL for Petitioner
Ms.Siddhi Talati, A.G.P. for Respondent No. 1
NOTICE SERVED for Respondent No. 2, 3

CORAM : MR.JUSTICE D.C.SRIVASTAVA
Date of decision: 08/12/98

ORAL JUDGEMENT

1. This writ petition under Article 226 of the Constitution of India has been filed for quashing the show cause notice dated 3.2.1998, Annexure : A, Order of Externing Authority dated 24.6.1998, Annexure : B, and the order of Appellate Authority dated 17.8.1998, Annexure : C, to the writ petition.

2. The show cause notice, Annexure : A, was issued to the petitioner in view of his commission of offences punishable under Chapter : XVI of the Indian Penal Code and other anti-social activities as to why he should not be externed from four districts, viz. Jamnagar, Rajkot, Junagadh and Kutch. The petitioner appeared, filed reply to the show cause notice and examined two witnesses in his defence. The externing Authority considering the statements of the complainant, petitioner and the defence witnesses passed the impugned order, Annexure : B, directing the externment of the petitioner for a period of two years from the aforesaid four districts. An Appeal was preferred. The Appellate Authority dismissed the Appeal vide Annexure : C to the petition. It is, therefore, this writ petition challenging these orders and the show cause notice.

3. The first argument of the learned Counsel for the petitioner is that the notice was issued in a mechanical manner so also the order of Externing Authority was passed in a mechanical manner as a result of which the order of externment cannot be sustained. The argument has been that the Externing Authority has mentioned that the petitioner has committed offences punishable under Chapter : XVI and XVII of the I.P.Code in the show cause notice as well as in the externment order whereas the particulars of the cases mentioned in Annexures : B and C disclose that the alleged offences are punishable under Chapter : XVI of the I.P.Code only. Thus, according to the learned Counsel for the petitioner inclusion of Chapter : XVII of the I.P.Code in the show cause notice as well as in the externment order exposes non-application of mind. In support of this, a Division Bench pronouncement in Karan Singh v/s. S.D.M., reported in 1988 (2) G.L.R. 1402 was cited. It is, however, to be seen whether mention of Chapter XVII of the I.P.Code

in the show cause notice and the externment order amounts to non-application of mind or not. If it was a case of clerical error or accidental slip this court in exercise of jurisdiction under Article 226 of the Constitution of India shall not examine the notice or the externment order as a Court of Appeal. In the show cause notice three cases registered against the petitioner under various sections of the Indian Penal Code and one under the Arms Act have been shown. Sections under which these offences were committed were also disclosed. Apparently offences at Sr.Nos.1 and 3 fall under Chapter : XVI and not under Chapter : XVII. But this ommission in the show cause notice will not render it invalid. What the Externing Authority has stated in the show cause notice is "this way, by your activities there is a possibility to cause fear, risk and damage to the public and their property and there is strong reasons to believe that you may commit offences which are punishable under Chapter : XVI of the I.P.Code. (Emphasis supplied)." These recitals in the show cause notice therefore show that it was not a case of non-application of mind rather the Externing Authority considering other anti-social activities of the petitioner the externing authority mentioned that he believes that the petitioner may commit offences punishable under Chapter : XVI & XVII of the I.P.Code. It is not a case where the offences at Sr.Nos.1 to 3 were misconstrued as offences punishable under Chapters : XVI and XVII of the I.P.Code. Likewise in the externment order the registered offences were not considered by the Externing Authority as the offences punishable under Chapters : XVI and XVII of the I.P.Code. What is stated in the order is again the same that due to fear and safety of their properties people are not making complaint against the aforesaid persons and the offences of aforesaid person is punishable under Chapter : XVI and XVII I.P.Code. Thus, while making this narration the Externing Authority kept in his consideration the offences disclosed by the persons who did not disclose their identity on account of fear of the petitioner. Thus, on this technical ground it cannot be said that the impugned order suffers from the vice of non-application of mind.

4. On the plea of non-application of mind another Division Bench pronouncement in Suleman v/s. State reported in 1989 (1) G.L.R. 1017 cited. However, general observation in this case cannot be applied in isolation ignoring the facts of that case. The observation of the Division Bench was that if there is non-application of mind the order of externment is liable to be quashed. However, on facts the non-application of

mind was found to this effect. In that case there was patent mistake in the order of the Externing Authority who considered that the crime case at Register No.58/86 was pending when the externment order was passed. The facts were otherwise. This case was tried by the Court and the petitioner was acquitted. Thus, it was a clear case of omission to take into account a vital factor, viz. acquittal of the petitioner in Crime No.58 of 1986 and for this reason the order of the Externing Authority was said to suffer from vice of non-application of mind. There is no such defect in the petition before me. Hence, ratio of that case can not safely be applied to the facts of this case.

5. The Notice, however, appears to be vague. Three cases, two under the Indian Penal Code and one under the Arms Act have been disclosed in the show cause notice and this disclosure is not vague. However, in Para : 1 of the show cause notice there is a general allegation that the petitioner is a head strong person and is argumentative, destructive and is openly attacking the people residing in this area with deadly weapon and with intention to kill them and by using force he is demanding money and other articles from the residents of the area. He was also teesing the ladies walking on the road in the company of his associates. These disclosure are certainly vague. There is no merit in the arguments that the area or locality has not been disclosed in the show cause notice. In the show cause notice it is mentioned that you are staying at the above mentioned address and the address of the petitioner is given in the show cause notice. It is, therefore, obvious that the Externing Authority meant that area of operation of the petitioner was the area where he was residing. Thus, there is no vagueness in the notice on this count. However, the date, time and place and the period during which the petitioner involved himself either personally or along with his gang is not disclosed in the show cause notice. If this is not disclosed then certainly the petitioner was prevented from making effective representation in his defence and he was suffering in dark. This has certainly violated liberty under Article 22(5) of the Constitution of India. In Kathi Harsur v/s. State of Gujarat, reported in 1986 G.L.H. 158 the Division bench of this Court found that in the notice there was no indication regarding period during which and area in which proposed externee indulged in nefarious activities. It was held that proposed externee was not given any reasonable opportunity to putforward his defence and that the mechanical show cause notice failed to satisfy the test for being held as valid show cause notice under Section

59 of the Bombay Police Act.

6. As pointed out above, in this case notice does not suffer from vagueness inasmuch as the area of operation is disclosed, but since the period, date and time of operation and activities mentioned in Para : 1 of the notice are not disclosed, it becomes vague and it cannaot be said to be a valid notice.

7. If the notice suffers from vital defect of vagueness the entire proceeding emanating from such notice will be rendered invalid, as a result thereof the impugned order of externment cannot be sustained. Thus, even though the Externing Authority gave detailed reasons in his order it cannot be sustained because the basis of the order, viz. show cause notice suffers from the vice of vaguness.

8. The order of Appellate Authority (Annexure : C) apparently shows that it was the result of non-application of mind by the Appellate Authority and this order was passed in a mechanical manner. The Appellate Authority was exercising quasi-judicial function and he was not exercising the function of the Detaining Authority under preventive detention laws where his subjective satisfaction is not to be interfered by the Courts. On the other hand quasi-judicial authority is bound to give some reasons in its order so as to show that the order is objective and does not suffers from the vice of subjectivity. The order of the Appellate Authority is subjective and not objective. In the order the Appellate Authority has mentioned five arguments advanced by the learned Advocate of the appellant, but these arguments were not at all even summarily dealt with by the Appellate Authority. The first was that the Externment order is illegal, improper and void. There is no finding of the Appellate Authority on this argument. The second argument that the cases against the appellant are pending hardly required any answer from the Appellate Authority because it had no material bearing on the result of the appeal.

9. The third argument in Appeal that time and place is not shown in the show cause notice was also not considered by the Appellate Authority. If the Appellate Authority would have considered that in the show cause notice the date, time and period of operation is not given certainly he could not have confirmed the order of the Externing Authority.

10. The next argument before the Appellate Authority

was delay in passing the order of externment. This was not considered by the Appellate Authority. This point was not agitated before me also in this petition. Suffice it to mention that the show cause notice was given on 3.2.1998 and the order of externment was passed on 24.6.1998. The learned A.G.P. has informed that 5 to 6 adjournments were sought by the petitioner in presenting reply to the show cause notice and in examining the witnesses in defence. After conclusion of the proceeding there was no significant delay in passing the externment order. Hence the externment order cannot be struck down on this ground.

11. Last ground that the offence related to Chapter : XVI of the I.P.Code was also not considered by the Appellate Authority. It was argued that the Appellate Authority formulated argument No.5 that the offences are relating to Chapter : XVII whereas in the Memo of Appeal Chapter : XVI was mentioned which shows that the Appellate Authority acted in a mechanical manner without perusing the memo of Appeal. This argument has substance and it renders the order of the Appellate Authority bad in law due to non-application of mind on this score. If the Appellate Authority did not care to incorporate the correct argument and also did not care to answer this argument it can be said that incomplete order was rendered by the Appellate Authority and such incomplete order cannot be sustained.

12. If the order of Appellate Authority cannot be sustained it cannot be held that the order of Externing Authority has merged in the order of the Appellate Authority. The order of the Appellate Authority has, therefore, to be quashed. The order of Externing Authority has also to be quashed because it proceeded from vague recitals and disclosures in the show cause notice about the date, time and period of operation of the petitioner in the alleged criminal activities.

13. In the result the petition succeeds and is hereby allowed. The impugned orders, Annexures : B & C, dated 24.6.1998 and 17.8.1998 are hereby quashed. Since the Show cause notice exhausted after the impugned orders, the same is not required to be quashed.

sd/-

(D. C. Srivastava, J.)

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